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***BOARD CERTIFIED CITY, COUNTY AND LOCAL GOVERNMENT LAW**

August 12, 2019

VIA ELECTRONIC MAIL

Honorable City Council Members
117 West Duval Street, Suite 425
Jacksonville, FL 32202

Honorable Duval County School Board Members
1701 Prudential Drive
Jacksonville, FL 32207

Re: General Counsel Binding Legal Opinion 19-03; School Capital Outlay Sales Surtax; Section 212.055(6), Fl. Stat.; School Board & City Council Roles

Dear Honorable City Council Members and School Board Members:

Enclosed is the binding legal opinion I committed to prepare that analyzes the respective roles of the City Council and the School Board concerning a School Capital Outlay Sales Surtax. As authorized by the City Charter, I am also providing an emergency resolution for Council's consideration authorizing this opinion to be immediately delivered to the Attorney General requesting her opinion as well.

It is the Council, and no other body, that is authorized to place the statement approved by the School Board on the ballot as a referendum. To best express the basic core of the opinion, let me use a layperson's example. Consider the following two sentences: (1) David shall place the slingshot on the table. (2) The slingshot shall be placed on the table by David. In the first example, David is *commanded* to place the slingshot on the table. In the second example, it is *directed* that David shall be the one to place the slingshot on the table, and no other, if it is to be placed on the table at all. The applicable statutory provision that has been a source of debate in this surtax matter is written in the identical syntax of the second statement. *Shall* means *shall* in either scenario, and one could say that David is the chosen one in either case. The only difference is that in one circumstance David *must* do something; in the other, David is the *only one* who can.

Absent express restrictions in the subject statute, the Council and the School Board may exercise the full array of legislative discretion and authority granted to them within the parameters of state and

local law. A fundamental rule in construing a statute is that where the rule imposes a duty upon a public officer or agency, it also confers by implication such powers as are necessary for the due and efficient exercise of those powers. In this context, the statutory language of the "*governing body of the county*" necessarily implicates something more than a ministerial role. In reading the duties designated to the public bodies in the subject statute as compared to other statutory authorizations allowing a school board to place other items on the ballot – in a few cases directly without the need for a city council or commission – a very solid rationale is that the Council's role with respect to the subject surtax matter is not ministerial, but includes legislative, fiscal, policy-oriented discretion.

The City Council cannot be mandated to approve a tax. It cannot be mandated to approve a referendum for a tax. This is not to say that it shouldn't be approved; that is a policy decision. The point is that the Council has the authority to weigh the legislative matters before it and make its decisions accordingly. More fundamentally, deliberative legislative bodies such as county commissions cannot be made to vote in one unilateral way only, unless expressly limited for specified ministerial purposes by the Legislature.

As noted in this memo, the Florida Supreme Court has dictated that nothing in the Florida legislative scheme regarding education finance suggests a legislative intent to preempt county involvement in the financing of public schools. To the contrary, various statutes make clear that the legislature contemplated county involvement in educational funding.

In summary, while it is the School Board that initiates the surtax proposition by approving a resolution that levies it, authorizes the statement and enacts a plan to carry it out, it is the Council that approves the referendum, as well as the timing as to when that ballot measure happens.

Council and the School Board should work together in good faith in an effort to resolve the issues related to the funding of capital projects for the school system and the question of whether the surtax solution is the one best for this matter, and if so, how that proposal should be conveyed to the electorate at large.

Please do not hesitate to contact me with any questions or concerns.

Sincerely,

Jason R. Gabriel
General Counsel

Enclosure

GC-#1299746 (word)

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MEMORANDUM

TO: **The Honorable Jacksonville City Council Members**
The Honorable Duval County School Board Members

FROM: **Jason R. Gabriel, General Counsel** JRG

DATE: **August 12, 2019**

RE: **General Counsel Binding Legal Opinion 19-03; School Capital Outlay Sales Surtax; Section 212.055(6), Fl. Stat.; School Board & City Council Roles**

I. BACKGROUND.

Section 212.055, Florida Statutes, authorizes various counties to levy nine types of sales surtaxes. The Legislature has placed all permitted surtaxes within Section 212.055. Some surtaxes may be levied by a defined set of counties. Others may be levied by all counties. Each surtax has its own restrictions and purposes. In particular, Section 212.055(6), Florida Statutes, authorizes the levy of a ½-cent School Capital Outlay Sales Surtax ("School Capital Surtax"). As with all such levies, before becoming effective, the School Capital Surtax requires a referendum and requires action by the governing body of the county (in the case of Jacksonville, the City Council). Unlike the other eight surtaxes, however, this surtax requires school board action. The Duval County School Board ("School Board") has acted pursuant to the statute and has requested the City Council to place the School Capital Surtax on the ballot.[1]

The Council has pending before it an ordinance[2] calling a special election for November 5, 2019 and placing on the ballot for that election the referendum statement created by the School Board. The question has arisen as to what power Section 212.055(6) grants to the School Board and what power the statute grants to the City Council, giving rise to the questions below.

II. QUESTIONS ASKED.

A. Whether the School Board may call a special election.

B. Whether the School Board may call a referendum election.

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[1] On May 7, 2019 the School Board passed a resolution requesting the City Council, as governing body of the county, to direct the Supervisor of Elections to hold a county-wide special election on November 5, 2019.

[2] Ordinance 2019-380

C. Whether the City Council has the discretion to select the date of the referendum election.

D. Whether the City Council has the discretion to reject a School Board request to call a special election to place a School Capital Surtax on the ballot.

E. Whether the City Council has the discretion to refuse to place a School Capital Surtax on any ballot.

F. Whether a court has the power to order the Council to call a special election to hold a referendum on a School Capital Surtax.

G. Whether a court has the power to order the Council to place a School Capital Surtax on any ballot.

III. SHORT ANSWERS.

A. The School Board may not call a special election.

B. The School Board may not call a referendum election.

C. The City Council has the discretion to select the date of the referendum election.

D. The City Council has the discretion to reject a School Board request to call a special election to place a School Capital Surtax on the ballot.

E. The City Council has the discretion to refuse to place a School Capital Surtax on any ballot.

F. A court does not have the power to order the Council to call a special election to hold a referendum on a School Capital Surtax.

G. A court does not have the power to order the Council to place a School Capital Surtax on any ballot.

IV. ANALYSIS.

A. Section 212.05, Florida Statutes.

Section 212.055 authorizes counties to levy nine various sales surtaxes. The statute begins with legislative intent, as follows:

> It is the legislative intent that any authorization for imposition of a discretionary sales surtax shall be published in the Florida Statutes as a subsection of this section, irrespective of the duration of the levy. Each enactment shall specify the types of counties authorized to levy; the rate or rates which may be imposed; the maximum length of time the surtax may be imposed, if any; the procedure which must be followed to secure voter approval, if required; the purpose for which the proceeds may be expended; and such other requirements as the Legislature may provide. Taxable transactions and administrative procedures shall be as provided in s. 212.054.

Fla. Stat. Ann. § 212.055 (West). This statement of intent requires that any authorization for imposition of a surtax be published as part of Section 212.055. While this statement cannot prohibit the Legislature from adopting a sales surtax in another general law, it does make it clear that no special act could authorize a surtax.

The statement requires that authority to levy include and "specify:"

(1) "the types of counties authorized to levy" any particular sales surtax;
(2) "the rate or rates which may be imposed" by a particular surtax;
(3) "the maximum length of time the surtax may be imposed, if any;"
(4) "the procedure which must be followed to secure voter approval, if required;"
(5) "the purpose for which the proceeds may be expended; and"
(6) "such other requirements as the Legislature may provide."

As noted by the Florida Supreme Court, the Legislature does not commonly enact clear statements of legislative intent. *Carawan v. State*, 515 So. 2d 161, 165 (Fla. 1987) ("[C]omprehensive statements of intent are rare. . . ."). Where those statements exist, courts should look to them as a primary source of interpreting a statute. *Id*. As succinctly summarized by the Attorney General, "[t]he intent of the Legislature is the primary guide in statutory interpretation." AGO 2013-01 (footnote omitted) *citing to* and *relying upon State v. J.M.*, 824 So. 2d 105, 109 (Fla. 2002); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071 (Fla. 1982); *Barruzza v. Suddath Van Lines, Inc*., 474 So. 2d 861 (Fla. 1st DCA 1985); and *Philip Crosby Associates, Inc. v. State Bd. of Indep. Colleges*, 506 So. 2d 490 (Fla. 5th DCA 1987). "Where the language used by the Legislature makes clear its intent, that intent must be given effect. Thus, absent a violation of a constitutional right, a specific, clear and precise statement of legislative intent will control in the interpretation of a statute." AGO 2013-01 (footnote omitted) (citations omitted). As stated by the Fifth District, "[t]he cardinal rule of statutory construction is that a statute should be construed so as to ascertain and give effect to the legislative intent expressed in the statute. *City of Tampa v. Thatcher Glass Corporation,* 445 So. 2d 578 (Fla.1984); *Deltona Corp. v. Florida Public Service Commission,* 220 So.2d 905 (Fla.1969)." *Philip Crosby Assocs., Inc.,* 506 So. 2d at 492 (Fla. 5th DCA 1987).

Subsection (6) of Section 212.055 authorizes imposition of a School Capital Outlay Surtax. It reads as follows:

(6) School capital outlay surtax.—

(a) The school board in each county may levy, pursuant to resolution conditioned to take effect only upon approval by a majority vote of the electors of the county voting in a referendum, a discretionary sales surtax at a rate that may not exceed 0.5 percent.

(b) The resolution shall include a statement that provides a brief and general description of the school capital outlay projects to be funded by the surtax. The statement shall conform to the requirements of s. 101.161 and shall be placed on the ballot by the governing body of the county. The following question shall be placed on the ballot:

____FOR THE ____CENTS TAX
____AGAINST THE ____CENTS TAX

> (c) The resolution providing for the imposition of the surtax shall set forth a plan for use of the surtax proceeds for fixed capital expenditures or fixed capital costs associated with the construction, reconstruction, or improvement of school facilities and campuses which have a useful life expectancy of 5 or more years, and any land acquisition, land improvement, design, and engineering costs related thereto. Additionally, the plan shall include the costs of retrofitting and providing for technology implementation, including hardware and software, for the various sites within the school district. Surtax revenues may be used for the purpose of servicing bond indebtedness to finance projects authorized by this subsection, and any interest accrued thereto may be held in trust to finance such projects. Neither the proceeds of the surtax nor any interest accrued thereto shall be used for operational expenses.
>
> (d) Surtax revenues collected by the Department of Revenue pursuant to this subsection shall be distributed to the school board imposing the surtax in accordance with law.

Fla. Stat. Ann. § 212.055 (West).

As guided by the statement of intent at the beginning of Section 212.055, Subsection (6) "specif[ies]" the maximum rate (0.5 percent) as well as the "procedure which must be followed to secure voter approval" and "the purpose[s] for which the proceeds may be expended." Subsection (6) does not provide a "maximum length of time the surtax may be imposed." In other words, the tax could be imposed for an unlimited amount of time. Finally, although the Legislature limits some surtaxes to specified types of counties, the Legislature specifies that any "count[y] [is] authorized to levy" the School Capital Surtax.

Before the School Capital Surtax becomes effective the procedures as "specif[ied]" in Subsection (6) must be followed:

(1) The School Board must adopt a resolution levying the tax.
(2) "The resolution shall include a statement that provides a brief and general description of the school capital outlay projects to be funded by the surtax."
(3) "The statement shall conform to the requirements of s. 101.161 . . ."
(4) "The statement . . . shall be placed on the ballot by the governing body of the county."
(5) "The resolution providing for the imposition of the surtax shall set forth a plan for use of the surtax proceeds . . ."
(6) The levy shall "take effect only upon approval by a majority vote of the electors of the county voting in a referendum."

Additionally, Subsection (6) authorizes the School Board, and only the School Board, to create the "plan for use of the surtax proceeds." Inasmuch as Subsection (6) requires information as to the purposes for which the proceeds may be expended, the School Board may only adopt a plan that ensures that the proceeds are expended consistent with the requirements and limitations in Subsection (6).

B. School Board Authority.

Section 212.055(6) authorizes the School Board to impose a "School Capital Outlay Sales Surtax." If the School Board seeks to impose the tax, it does not go into effect unless the voters of Duval County, in a referendum, approve the levy. Although the statute requires a referendum, it is indisputable that is does not expressly authorize the School Board to (1) call a special election on which to place the referendum or (2) call a referendum election. Without such express authority granted by Section 212.055(6) or by another law enacted by the Legislature, the School Board does not have the authority to either call a special election or to otherwise call a referendum election.

As recently held by the First District, in an opinion approved by the Supreme Court, "The state constitution provides that 'Special elections and referenda shall be held as provided by law.' Art. VI, § 5, Fla. Const. The phrase 'as provided by law' means an act passed by the Legislature. *Holzendorf v. Bell*, 606 So.2d 645, 648 (Fla. 1st DCA 1992)." *Gretna Racing, LLC v. Dep't of Bus. & Prof'l Regulation*, 178 So. 3d 15, 28 (Fla. 1st DCA 2015), *approved sub nom. Gretna Racing, LLC v. Fla. Dep't of Bus. & Prof'l Regulation*, 225 So. 3d 759 (Fla. 2017). More than 25 years ago, the First District held that the voters of Jacksonville had no power to adopt a referendum approval of a City Council ordinance, simply because no such authority had been granted by the Legislature:

> Article 6, section 5, Florida Constitution, controls the manner in which the power of referendum may be granted. Since the constitution expressly provides that the power of referendum can be granted only by the legislature, it is beyond the power of the electorate to say what shall or shall not be done by referendum. . . . [T]he electorate has no power, by initiative and referendum, to enact a charter amendment conferring upon itself the power to restrict action by the city council by making the council's action subject to referendum. This is so simply because no such authority has been granted by the legislature.

Holzendorf, 606 So. 2d at 648. The Legislature has not made a general grant of power to the School Board to call a special election or to hold a referendum. Because special elections and referendum may only be authorized and are regulated by the Legislature, a school board may call a referendum or special election only if specifically authorized by the Legislature. Section 212.055(6) provides to school boards neither authorization to call a special election nor authorization to hold a referendum.

Importantly, the Legislature has granted to school boards the power to call a referendum election in a variety of other circumstances.[3] These various statutes in which the Legislature granted

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[3] E.g., **1001.34. Membership of district school board**

* * *

(2) A district school board may modify the number of members on its board by adopting a resolution that establishes the total number of members on the board, which may not be less than five, and the number of members who shall be elected by residence areas or elected at large. The resolution must specify an orderly method and procedure for modifying the membership of the board, including staggering terms of additional members as necessary. If the resolution is adopted, the district school board shall submit to the electors for approval at a referendum held at the next primary or general election the question of whether the number of board members should be modified in accordance with the resolution adopted by the district school board. If the referendum is approved, election of additional school board members may occur at any primary, general, or otherwise-called special election.

Fla. Stat. Ann. § 1001.34 (West)

1001.362. Alternate procedure for the election of district school board members to provide for single-member representation

(1) This section shall be known and may be referred to as "The School District Local Option Single-Member Representation Law of 1984."

authority to school boards to call referendum elections, highlight the absence of such grant of authority in Section 212.055(6).

Instead of granting to the School Board the power to call a special election or to call a referendum election, Section 212.055(6) authorizes only the City Council to place the referendum on

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(2) District school board members shall be elected to office in accordance with the provisions of ss. 1001.36 and 1001.361, or as otherwise provided by law, unless a proposition calling for single-member representation within the residence areas of the district is submitted to and approved by a majority of the qualified electors voting on such proposition in the manner provided in subsection (3).
(3) A proposition calling for single-member representation within the residence areas of the district shall be submitted to the electors of the district at any primary, general, or otherwise-called special election, in either manner following:
(a) The district school board may adopt a formal resolution directing an election to be held to place the proposition on the ballot.

Fla. Stat. Ann. § 1001.362 (West)

1001.364. Alternate procedure for election of district school board chair
(1) The district school board chair shall be elected in accordance with the provisions of s. 1001.371 unless a proposition calling for the district school board chair to be elected as an additional school board member by districtwide vote is submitted to and approved by a majority of the qualified electors voting on such proposition in the manner provided in subsection (2).
(2) A proposition calling for the district school board chair to be elected by districtwide vote shall be submitted to the electors of the school district at any primary, general, or otherwise-called special election in either of the following manners:
(a) The district school board may adopt a formal resolution directing that the proposition be placed on the ballot; . . .

Fla. Stat. Ann. § 1001.364 (West)

1001.42. Powers and duties of district school board
The district school board, acting as a board, shall exercise all powers and perform all duties listed below:
* * *
(11) School plant.--Approve plans for locating, planning, constructing, sanitating, insuring, maintaining, protecting, and condemning school property as prescribed in chapter 1013 and as follows:
* * *
5. Enter into leases or lease-purchase arrangements, in accordance with the requirements and conditions provided in s. 1013.15(2), with private individuals or corporations for the rental of necessary grounds and educational facilities for school purposes or of educational facilities to be erected for school purposes. Current or other funds authorized by law may be used to make payments under a lease-purchase agreement. Notwithstanding any other statutes, if the rental is to be paid from funds received from ad valorem taxation and the agreement is for a period greater than 12 months, an approving referendum must be held.

Fla. Stat. Ann. § 1001.42 (West)

1001.461. District school superintendent; procedures for making office appointive
(1) Pursuant to the provisions of s. 5, Art. IX of the State Constitution, the district school superintendent shall be appointed by the district school board in a school district wherein the proposition is affirmed by a majority of the qualified electors voting in the same election making the office of district school superintendent appointive.
(2) To submit the proposition to the electors, the district school board by formal resolution shall request an election that shall be at a general election or a statewide primary or special election. The board of county commissioners, upon such timely request from the district school board, shall cause to be placed on the ballot at such election the proposition to make the office of district school superintendent appointive.

Fla. Stat. Ann. § 1001.461 (West)

1011.71. District school tax
* * *
(9) In addition to the maximum millage levied under this section and the General Appropriations Act, a school district may levy, by local referendum or in a general election, additional millage for school operational purposes up to an amount that, when combined with nonvoted millage levied under this section, does not exceed the 10-mill limit established in s. 9(b), Art. VII of the State Constitution. Any such levy shall be for a maximum of 4 years and shall be counted as part of the 10-mill limit established in s. 9(b), Art. VII of the State Constitution.

Fla. Stat. Ann. § 1011.71 (West)

1011.73. District millage elections
(1) Millage authorized not to exceed 2 years.--The district school board, pursuant to resolution adopted at a regular meeting, shall direct the county commissioners to call an election at which the electors within the school districts may approve an ad valorem tax millage as authorized in s. 9, Art. VII of the State Constitution.

Fla. Stat. Ann. § 1011.73 (West)

the ballot. One question answered below is whether the statute requires the City Council to call a special election if requested by the School Board. The other question answered below is whether statute requires the City Council to place the referendum on a ballot.

C. City Council Authority.

1. Statutory Construction

As noted above, "[t]he intent of the Legislature is the primary guide in statutory interpretation." AGO 2013-01 (footnote omitted) (citation omitted). In regards to the questions raised, the primary words of importance in Section 212.055's statement of intent are that any surtax authorization "specify *the types of counties* authorized to levy." (Emphasis added). This statement indicates that the purpose of Section 212.055 is both to authorize "specif[ied] . . . types of counties" to levy various surtaxes and to limit to "specif[ied] . . . types of counties" the authority to levy various types of surtaxes.

Also as noted above, in enacting Section 212.055(6) the Legislature chose not to grant school boards the power to place the School Capital Surtax referendum directly on the ballot. Instead, the Legislature required an affirmative vote of the Council (i.e., the governing body of the county) to place the referendum on the ballot. This requirement is entirely consistent with the statement of intent at the beginning of Section 212.055. Each of the nine surtaxes authorized by Section 212.055 requires an affirmative vote of the applicable county commission.

In reviewing an earlier version of Section 212.055(6), the Attorney General concluded that by requiring the governing body of the county's involvement, the Legislature must have intended that the county governing body have at least some power. The Attorney General concluded that "i[t] is a general rule of statutory construction that where the statute imposes a duty upon a public officer, it also confers by implication such powers as are necessary for the due and efficient exercise of those powers."[4] As stated by the Second District, "It is the well settled rule in this state that if a statute imposes a duty upon a public officer to accomplish a stated governmental purpose, it also confers by implication every particular power necessary or proper for complete exercise or performance of the duty, that is not in violation of law or public policy. *In re Advisory Opinion to the Governor*, Fla., 60 So. 2d 285, and cases therein cited." *Peters v. Hansen*, 157 So. 2d 103, 105 (Fla. 2d DCA 1963).

This principle supports the conclusion that when the Legislature requires action by the governing body of the county it grants to the governing body its full legislative authority. The Legislature chose the governing body rather than the chief administrative officer of the county or the supervisor of elections, or the school board. The Legislature used the words "governing body of the county," choosing words that indicate the body with legislative, policy-making authority. Put another way, by vesting referendum power in the "governing body" to act, the Legislature granted full legislative power, inclusive of the burdens, responsibilities and powers therein, to the county commission.

Another long-embraced principle of statutory construction confirms this conclusion: "Unless expressly or impliedly restrained by statute, a municipal corporation has discretion in the choice of means and methods for exercising the powers given to it for governmental or public purposes, and the usual limitations upon the actions of municipalities within their legal powers are good faith and

[4] AGO 98-29 (footnote omitted) (*citing In re Advisory Opinion to the Governor*, 60 So. 2d 285 (Fla. 1952); *State ex rel. Martin v. Michell*, 188 So. 2d 684 (Fla. 4th DCA 1966), *cert. discharged*, 192 So. 2d 281 (Fla. 1966); *Peters v. Hansen*, 157 So. 2d 103 (Fla. 2d DCA 1963)).

reasonableness, not wisdom or perfection. *Jacksonville Electric Co. v. City of Jacksonville*, 36 Fla. 229, text, 271, 18 South. 677, 30 L. R. A. 540, 51 Am. St. Rep. 24." *S. Utilities Co. v. City of Palatka,* 86 Fla. 583, 603, 99 So. 236, 242 (1923), *aff'd sub nom. S. Utilities Co. v. City of Palatka, Fla.,* 268 U.S. 232, 45 S. Ct. 488, 69 L. Ed. 930 (1925). Nothing in the statute expressly or impliedly restrains the exercise of the full legislative power of the City Council.

It has been suggested that in AGO 98-29, the Attorney General concluded that Section 212.055(6) limited the power granted to the county commission to the power of having the discretion as to date of the election. The Attorney General in that opinion assumed, because the county commission and the school board agreed, that the county commission did not have its full legislative power to act as governing body and that the statute required the county commission to place the referendum on a ballot. Because of that assumption, the Attorney General provided no explanation as to what words in the statute limited the governing body's discretion and power to selecting a date. Furthermore, the Attorney General did not need to discuss the principle of statutory construction that a grant of power includes the full power of that body unless the grant includes a restriction, because the only question asked was whether the county commission had the power to choose an election date.

The Attorney General did not consider (nor did he need to) the possibility that the county governing body discretion might include: (1) public policy, e.g., considering the cumulative impact of the School Capital Surtax combined with existing or potentially levied county sales surtaxes; (2) the type of election, e.g., primary, general, special, consolidated government first election, or second election; (3) form of election, e.g., traditional ballot box or ballot by mail election. The Attorney General did not consider, and did not need to consider, that the Legislature intended to burden both the school board *and* the county commission with the public accountability for placing the referendum on a ballot.

Section 212.055 inherently suggests the interest the county has in the School Capital Surtax. Though Section 212.055(6) is the only surtax solely available to school boards, the school boards have access to other surtaxes. Both Section 212.055(2) and Section 212.055(3) sales surtaxes can be made available to school boards. Pursuant to Section 212.055(2) a county could agree to split a one-cent sales tax 50/50 with a school board. In the event the voters approved this surtax, the governing body (believing that it had helped the school board obtain the equivalent of a half-cent sales surtax) may strongly object to the school board later requesting that it place on the ballot another half-cent sales surtax for the school board. Should each be enacted, the citizens of the county would be burdened with a 1 1/2-cent surtax, with 2/3 of the surtax going to the school board. Likewise, a governing body in a county without either of the two above-listed surtaxes may see the request of the school board to impose the School Capital Surtax as an opportunity to join the school board in asking the voters in one election to approve a tax that grants to each the school board and the county government a half-cent surtax by requesting a one-cent surtax split 50/50. The interaction of these surtaxes and the impact they have on each other provide yet another reason that the statute must be interpreted to grant the governing body of the county the discretion to place or not place the School Capital Surtax on the ballot.

Further evidence of the county's interest in School Board matters that have county-wide impact can be found in the City's very own Charter, which creates a unique relationship between the Consolidated Government and the School Board by making the School Board an independent agency of the City. This is unlike any other school board and county commission relationship within the State of Florida. For example, Article 13 of the Charter authorizes City Council to set the compensation of School Board members; it authorizes City Council to redistrict School Board

districts at the appropriate time; it allows Council to direct the School Board on the use of internal services (with some limitation). Section 108.503, *Ordinance Code* authorizes only the City Council to authorize the institution or authorization of any lawsuits by the School Board against the City or one of its agencies. This is not to say the School Board is ultimately subordinate to the Council, however, with respect to the sales tax issue, and the resultant fiscal interplay to county-wide finances, the state of the law (both statutory and local) gives Council the final vote on approving the measure for the ballot.

The conclusion follows that the Legislature intended that Section 212.055 grant to and regulate the authority of *counties* to impose surtaxes. Consistent with this intent, Section 212.055(6) grants to the City Council the power and discretion to (1) select the date of the election, (2) refuse to call a special election, and (3) refuse to place the referendum on any ballot.[5]

2. Mandatory vs. Directory

The difficulty in accepting the above conclusion revolves around the meaning of the phrase "shall be placed on the ballot". The statute, by using the word "shall" looks – on its face – like a command, and courts generally find the word to have a mandatory meaning. On the other hand, where a mandatory reading of the word "shall" would violate separation of powers, the court will interpret the word as being directory rather than mandatory.[6] It depends on the context in which the word is used and the legislative intent. *See Allied Fidelity Ins. Co. v. State*, 415 So. 2d 109, 110 (Fla. 3d DCA 1982). Moreover, in order to interpret a statute in a manner that avoids violating the Florida Constitution, the Florida Supreme Court has construed the word "shall" to be permissive as used in a statute that provided that the municipality "shall" impose a tax.[7]

Courts have construed "shall" as directory when it appeared as though the statute was creating the order of business. "If a provision, though mandatory in terms, is designed simply to further the orderly conduct of business, such provision is generally deemed directory only. *See Reid v. Southern Dev. Co.*, 52 Fla. 595, 42 So. 206 (1906)."[8] In other words, "where the directions of a statute are given with a view to the proper, orderly and prompt conduct of business merely, the provision may generally be regarded as directory."[9] The word "shall" could therefore be directory or mandatory. Given the statement of intent in Section 212.055(6) regarding "specify[ing] the types of counties authorized to levy" a sales surtax, the words "shall be placed on the ballot by the governing body" direct that it is the governing body of the county, and only the governing body of the county, that has the power to place the referendum on the ballot. Those words of direction do not, however, mandate that the governing body do so.

[5] Attorneys advocating that the School Board have sole discretion as to the surtax at issue read the statute to say "that a ***referendum*** passed by the School Board 'shall be placed on the ballot by the governing body of the county.'" (August 2, 2019 Memorandum by Scott S. Cairns, W.C. Gentry and Henry M. Coxe III). That is a subtle, but important, paraphrase of the statute. The statute does not state that the referendum shall be placed on the ballot but that the "statement" – the brief and general description of projects to be funded by the surtax – be included.

[6] *Fagan v. Robbins*, 117 So.863 (Fla. 1928) and *State v. Shipman*, 360 So. 2d 782 (Fla. 4th DCA 1978).

[7] *Belcher Oil Co. v. Dade Cty.*, 271 So. 2d 118,121 (Fla. 1972) ("Constitutionally construed, the statute empowers but does not require the city to impose such a tax if the municipality in its discretion finds a particular service to be competitive.").

[8] *State Dep't of Envtl. Regulation v. Puckett Oil Co.*, 577 So. 2d 988, 991 (Fla. 1st DCA 1991).

[9] *Lomelo v. Mayo*, 204 So.2d 550, 553 (Fla. 1st DCA 1967) (internal quotations omitted).

3. Attorney General Opinion Regarding "Shall"

In AGO 98-29, the Attorney General assumed that the predecessor statute (indistinguishable in pertinent part from the current statute) required the board of county commissioners to put the question on the ballot. This conclusion is, on its face, consistent with *School Board of Clay County v. Clay County Board of County Commissioners*, Case No. 10-2014-CA-000983, in which the Fourth Circuit ordered the Board of Commissioners to meet and adopt a resolution placing a school board referendum question on the ballot. The Clay County case concerned the application of Section 1001.461, Florida Statutes, which reads, in pertinent part:

> To submit the proposition to the electors, the district school board by formal resolution shall request an election that shall be at a general election or a statewide primary or special election. The board of county commissioners, upon such timely request from the district school board, shall cause to be placed on the ballot at such election the proposition to make the office of district school superintendent appointive.

The trial court concluded that the board of commissioners had no discretion whether to place the question on the ballot and no discretion as to which election, concluding that the board of commissioners must place it on the upcoming general election ballots. This statute also provided that the school board had the authority to request a referendum, and also provided that the board of county commissioners place the referendum on the ballot upon "timely request from the school board." The Attorney General opinion and the Fourth Circuit decision arguably support the conclusion that "shall be placed on the ballot" mandates that the City Council put the School Board's question on the ballot.[10]

As noted above, however, the Attorney General's opinion is distinguishable, because the Attorney General did not consider the question of the full extent of the governing body's power. The Clay County case is distinguishable, because the statute states the type of election where the referendum question shall be placed, and more specifically commands that the board of county commissioners "shall cause [the proposition] to be placed on ballot" for the next specified election "upon the timely request from the district school board."

4. Statutory Construction – Other Statutes and School Board Power

Importantly, in at least three statutes, the Legislature authorizes school boards to call an election *without* submitting it to the applicable county commission.[11] The Clay County lawsuit concerned a statute that provided that the commission place it on the ballot if timely submitted by the school board. With regard to Section 212.055(6), by contrast, the Legislature chose not to let a school board place the sales surtax directly on the ballot, in clear distinction with the statutes that permit direct placement by the school board. In contrast with the statute in the Clay County case, Section 212.055(6) does not direct a specific election nor does it direct action upon a "timely request."

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[10] The Attorney General also concluded that the board of commissioners, not the school board, had the discretion to choose which election. He did not conclude that a court could order the board of commissioners to place the question on the ballot. Instead, he recommended that the board of commissioners and the school board work out an agreed upon date.

[11] E.g., Section 1001.34(2); Section 1001.364(2), and Section 1001.362(2), Florida Statutes.

In construing legislation, courts should not assume that the Legislature acted pointlessly."[12] Stated another way, the Florida Supreme Court "presume[s] that the Legislature acts purposefully when it removes language from one statute, but leaves identical language in a different statute." *See, e.g., Beach v. Great W. Bank,* 692 So. 2d 146, 152 (Fla.1997); *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.,* 654 So. 2d 911, 914 (Fla. 1995) ('When the [L]egislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded.'); *Wright v. City of Miami Gardens*, 200 So. 3d 765, 773 (Fla. 2016), *accord Fla. State Racing Comm'n v. Bourquardez*, 42 So. 2d 87, 90 (Fla. 1949) (citation and internal quotation omitted) ("The use by the legislature of certain language in one instance and wholly different language in the other indicates that different results were intended and the courts have so presumed. Under this rule, where language is used in one section of the statute different from that used in other sections of the same chapter it is to be presumed that the language is used with a different intent."). It would therefore be pointless for the Legislature to require the governing body of the county to act, if the statute is interpreted to have the same meaning as statutes that permit a school board to place matters directly on the ballot. Here, the City Council is involved under the statute because only it can place the referendum on the ballot, but there is no explicit requirement that it do so.

Given the complete lack of standards provided to a county governing body by Section 212.055(6), the phrase "shall be placed on the ballot" should be construed as providing *direction* and *order*, not a *command*. As noted by the Attorney General, county governing body involvement must mean that governing body has at least some power and discretion. The three statutes that grant school boards direct access to the voters without the interplay of the county commission support that conclusion. Given that nothing in the statute suggests a limitation on the grant of power to the governing body, the power should be construed at its fullest, so long as it does not conflict with the statute.

Finally, construing "shall" as mandatory would, as shown below, require a violation of separation of powers if a court were to order the legislative body, i.e., the Council, to adopt legislation. In *Belcher*, for example, the Florida Supreme Court reasoned that "in proper cases and particularly so where required to conform to constitutional requirements, ["shall"] may be construed as permissive only." *Belcher*, 271 So. 2d at 121. Thus, the Court concluded that while the general law permitted Dade County to tax public utilities enumerated in the statute and to tax services which it finds to be competitive with the specifically enumerated utilities, "because of constitutional limitation this is a right not an absolute obligation." *Id.* at 122. Here, despite the mandatory appearance of "shall" in Section 212.055(b), the word "shall" has *directory, not mandatory,* meaning.

Even if Section 212.055(6) is construed to require placement of the referendum question on the ballot, then at a minimum, as concluded by the Attorney General, the City Council has the discretion to determine the date of the election. Where the Dade County charter prescribed a 60-day period in which to call an election, the Third District held that "the Board of County Commissioners, in their discretion as the legislative body of the county, may set such election which may not be interfered with by the courts without a showing of fraud, corruption, gross abuse of discretion, etc." *Senior Citizens Protective League, Inc. v. McNayr*, 132 So. 2d 237, 239 (Fla. 3rd DCA 1961), *accord, Miller v. City of Casselberry*, 698 So. 2d 1386, 1387 (Fla. 5th DCA 1997) (upholding the trial court's order where, "[t]he trial court found that the City's scheduling of the election did not violate any provision of law and that no showing had been made of fraud, corruption, or gross abuse

[12] *Neu v. Miami Herald Pub. Co.*, 462 So. 2d 821, 825 (Fla. 1985).

of discretion by the Casselberry City Commission. "). The only conclusion is that the governing body has the power and discretion to choose the date of the election.

The discretion to set the date of the election includes the discretion to choose the type of election, e.g., as part of a general election or as a special election. In particular, the governing body has discretion on whether to call a special election. Section 100.101, Florida Statutes, and Sections 5.06, 6.06, 8.03, 9.03, 10.03, 11.03, 13.05, and 15.01 of the Jacksonville Charter require the calling of special elections under defined circumstances. In contrast, no law requires the holding of a special election for a sales surtax; consequently, the Council[13] has absolute discretion whether to hold such an election. The Council also has the absolute discretion to choose or not choose a mail ballot Election, as authorized, but by no means required, by Section 101.6102, Florida Statutes.

In *Miami-Dade County Board of Commissioners v. Accountable Miami-Dade*, 208 So. 3d 724, 729 (Fla. 3d DCA 2016), the Third District Court of Appeals was confronted with a voter petition that the Board of County Commissioners had held to be deficient as to form. Based on the Commissioners' findings, the court concluded that, under the county charter, the Board of County Commissioners "was not required—nor was it even authorized—to take further action regarding the petition, whether by adopting it or by permitting it to be placed on the ballot." *Id.* at 732. Of note, the Court's endorsement of the County Commission's substantive review of the petition underscores that the Commission retained more than a mere ministerial role and, therefore, reversed the trial court's entry of a writ of mandamus. At a minimum, the substantive requirements of Section 212.055(6) similarly require more than a ministerial role for the City Council.

Further, notwithstanding the powers granted to the School Board, the City Council, as the governing body, retains a substantive role. That is illustrated by *St. Johns County v. Northeast Florida Builders Association, Inc.,* 583 So. 2d 635 (Fla. 1991) in which plaintiffs challenged an ordinance imposing impact fees to be used for the construction of new school facilities. The plaintiffs argued, in part, that the county commission had improperly interjected itself into an area in which school boards have been given exclusive constitutional and statutory authority. In rejecting that argument, the Court stated:

> We do not find the ordinance inconsistent with the constitutional and statutory provisions cited by the builders. First, article IX, section 4(b) is only a grant of taxing authority to the school boards. It does not limit the imposition of a fee such as the one at issue here. Nor does that provision in any way limit county involvement in school financing. Further, section 230.23 does not place the exclusive duty to secure adequate public school financing with school boards. Finally, nothing in the legislative scheme regarding education finance suggests a legislative intent to preempt county involvement in the financing of public schools. To the contrary, various statutes make clear that the legislature contemplated county involvement in educational funding. See §§ 236.012(4), 236.24(1), 236.35, Fla.Stat. (1989).

[13] For the purposes of Section 212.055(6), the governing body of the county is the City Council and the Mayor. In order to place a referendum on the ballot, the Council must adopt legislation, an ordinance. The Charter provides that the Mayor may veto any ordinance. Nothing in Section 212.055(6) suggests that it seeks to modify the fundamental structure of the City's government. See, Section 212.055(2) referring to a sales surtax levied by the "governing authority" in each county; Section 212.055(5) referring to an "ordinance…" approved by extraordinary vote of the county commission;" Section 212.055(8) referring to the "governing authority of a county;" and most significantly, Section 212.055(9) authorizes the "governing body of a county" to levy a Pension Liability Surtax, a tax levied by the City via ordinance adopted by the Council and submitted to the Mayor for his determination as to whether to sign it, veto it, or let it become effective without his signature.

Id. at 642. This decision, together with *Miami-Dade County Board of Commissioners v. Accountable Miami-Dade*, underscore that the City Council possesses substantive interests and roles which have not been the subject of explicit exclusion under Section 212.055(6).

In conclusion, the phrase "shall be placed on the ballot by the governing body" does not require the City Council to (1) select a particular date to hold a referendum election, (2) call a special election; or (3) to place the referendum on any particular ballot.

D. Judicial Authority

1. Separation of Powers

Even if the City Council was required by the statute to place the referendum on the ballot, there could be no remedy from the courts. Relying on separation of powers analysis,[14] courts throughout the nation and Florida have concluded that it violates separation of powers for a court to order a legislative body to adopt legislation.[15] The City Council has only one fundamental power; to adopt legislation, and the courts cannot order the Council to adopt any legislation.[16] In *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481, 17 S. Ct. 161, 165, 41 L. Ed. 518 (1896), the Supreme Court held:

> [A] court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly. . . .[T]he courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts, which a court of equity will not enjoin.

Requiring adoption of legislation is no less a violation of separation of powers than prohibiting the adoption of legislation. It is true that some courts, including the Fourth Circuit, have

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[14] The goal of the doctrine of separation of powers is "the preservation of the inherent powers of the three branches of government and the prevention of one branch from infringing on the powers of the others to the detriment of our system of constitutional rule." *Walker v. Bentley*, 660 So. 2d 313, 320 (Fla. 2d DCA 1995). Thus, no branch of government may encroach on another, and thus the Legislature cannot use the word "shall" in such a way so as to limit another branch's authority, meaning its use in some contexts is permissive, not mandatory. *See id.* (holding that legislature could not limit the court's contempt powers by use of the word "shall," and thus its meaning in statute could not be mandatory).

[15] *E.g., Suffolk Cty. Ethics Comm'n v. Lindsay*, 30 Misc. 3d 1214(A), 920 N.Y.S.2d 244 (Sup. Ct. 2011) (internal quotations omitted) ("In this regard, it is not the province of the courts to direct the legislature how to do its work). (*Matter of Fornario v. Clerk to Rockland County Legislature,* 307 A.D.2d at 929, 762 N.Y.S.2d 896, *quoting New York Pub. Interest Research Group v. Steingut,* 40 N.Y.2d 250, 256, 386 N.Y.S.2d 646 [1976]; *see People ex rel. Hatch v. Reardon,* 184 N.Y. 431, 442, 77 N.E. 970, [1906] *affd.* 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415)."); *State v. Augafa*, 92 Haw. 454, 470, 992 P.2d 723, 739 (Ct. App. 1999) (internal quotations omitted) ("[A] court strays far from that function [of adjudicating cases] when it directs legislative bodies to adopt specific laws. Such action is not reasonably necessary to effectuate its judicial power."); *Lucchesi v. State*, 807 P.2d 1185, 1189–90 (Colo. App. 1990) ("[S]eparation of governmental powers . . . prohibits the courts from ordering the legislative branch either to adopt, or not to adopt, specific legislation. *See Serrano v. Priest*, 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (1976)."); and *Steiner v. Superior Court*, 50 Cal. App. 4th 1771, 1782–83, 58 Cal. Rptr. 2d 668, 676 (1996) (internal quotations and citations omitted) (There is a "well-established principle, rooted in the doctrine of separation of powers, that the courts may not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to sign, specific legislation.... [B]y virtue of the separation of powers doctrine courts lack the power to order the Legislature to pass a prescribed legislative act.... Were it otherwise, courts would be involved in 'an attempt to exercise legislative functions, which ... is expressly forbidden....").

[16] Section 5.07, Charter.

ruled that where a statute creates a non-discretionary duty, the court may order a local governing body to put a referendum on the ballot. Although the Fourth Circuit in the Clay County case did order the county commission to place a referendum on the ballot, the court was ruling on different and more specified statutory language and never addressed whether its ruling would violate separation of powers, nor was that argument presented to the court. More importantly, the Fourth Circuit did not consider a separation of powers argument where the statute grants at least some discretion to the legislative body.

In summary, even where the constitution requires adoption of legislation, the court cannot order such adoption.[17] A court would therefore violate separation of powers by ordering the Council to adopt legislation placing a referendum on the ballot, at least where some legislative discretion and authority remains.[18] In this case, the statute in no way demands a particular date or type of election, even if one were to assume that the words of the statute require placing the referendum, on "the ballot."

The best conclusion is that it would violate separation of powers for a court to order the City Council to place the referendum on the ballot.

2. Mandamus

Mandamus is extraordinary relief. In order for a court to issue the extraordinary writ of mandamus, a plaintiff would have to establish "that he has a clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him." *RHS Corp. v. City of Boynton Beach*, 736 So. 2d 1211, 1213 (Fla. 4th DCA 1999), citing *Hatten v. State*, 561 So. 2d 562, 563 (Fla. 1990) (internal citations omitted). This means that mandamus can only command that a public official perform a ministerial act, which means "there is no room for the exercise of discretion, and the performance being required is directed by law." *Id.* (denying mandamus relief to compel city to inspect certain property and enforce land development regulations) (citations omitted). The public official must have a "clear, indisputable legal duty" to perform the act in question. *Sancho v. Joanos*, 715 So. 2d 382, 385-86 (Fla. 1st DCA 1998) (holding that prospective county commissioner candidate was not entitled to writ of mandamus to compel county supervisor of elections to file qualifying documents out of time, as there was no "clear, certain, indisputable and well-established right or legal duty"); *State ex rel. Lanier v. Padgett*, 19 Fla. 518 (Fla. 1882) (stating that where there was no law requiring publication of notice of county-seat election in the newspaper, the posting of written notice in public places was sufficient).

Without the proper legal authority to do so, a court may not direct a public body to perform a non-ministerial act through the extraordinary writ of mandamus. *See State v. Stone*, 265 So. 2d 56, 58 (Fla. 1st DCA 1972) (reasoning that "the Secretary of State is without authority to pass judgment on questions [regarding] the filing instruments concerning the qualifications of candidates"); *Miami-*

[17] *Accord,* N.D.A.G. Oct. 16, 1986:

> The legislative branch of state government has the exclusive authority to enact legislation. . . . Therefore, under the separation of powers principle, neither the executive branch nor the judicial branch of the state may compel the legislative branch to exercise the powers and duties bestowed upon the Legislature by the constitution, including the Legislature's authority to enact legislation. In other words, the Legislature cannot be compelled to enact legislation, even when the enactment of such legislation is constitutionally mandated.

[18] *See, New Orleans Water Works Co. V. New Orleans,* 164 U.S.471, 481, 17 S.Ct. 161, 41 L.Ed.518 (1896) ("a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character").

Dade County Bd. of Com'rs v. An Accountable Miami-Dade, 208 So. 3d 724, 730-31 (Fla. 3d DCA 2016) (stating that public official must be clothed with the authority to discharge his duty, and county could not be compelled through mandamus to place petition on general election ballot); *see also State v. Stone*, 266 So. 2d 345, 346-47 (Fla. 1972) (denying writ of mandamus to compel Secretary of State to omit name of candidate from list of those qualified to run for county judge); *In re Advisory Opinion to the Governor*, 60 So. 2d 285 (Fla. 1952) (holding that Governor had duty to call special primary); *Fla. Op. Atty. Gen.* 074-48 (Feb. 14, 1974) (discussing Governor's mandatory duty under Section 100.101 to call a special election to fill a vacancy in state legislative office).

In short, mandamus is only ordered where *no* discretion exists, and thus it would not be appropriate here.[19] The Attorney General has clearly held that the governing body of the county has at least some discretion. If an ordinance is not adopted to place the referendum on the ballot, the Council would be justified in defending any petition for a writ of mandamus as not available, arguing that: (1) the statute leaves discretion to determine (a) the date of the election and (b) that the proposed sales surtax would impact the City's choices with regard to future surtaxes, and (2) that a mandamus order would violate separation of powers. No court and no Attorney General opinion have addressed any of these arguments, either for or against.[20] Because of the discretion afforded City Council, there could be no remedy in court that would force City Council to place the referendum on the ballot.

3. Justiciability

Even if a claim for declaratory judgement were brought to construe the purpose or duty or responsibility of City Council involvement in implementation of Section 212.055(6), there exists no "manageable standard by which to avoid judicial intrusion into the powers of the [legislative body]."[21] The statute gives no standard by which to judge any action of the City Council. In other words, attempting to define the role of the City Council would violate separation of powers, because nothing in the statute creates or suggests a standard by which a court could determine the limits of the Council's power to choose the date of the election or the form of the election. Indeed, nothing in the statute explains why a court should limit the council's discretion to merely the date, or the form, of the election.

In *Mullen v. Bal Harbour Village* 241 So. 3d 949, 957 (Fla. 3d DCA 2018), in denying declaratory and injunctive relief, the court held that plaintiffs were not entitled to mandamus relief because they had no clear legal right to the requested remedy, given that the statute governing municipal charter amendment elections did not "set forth with any specificity" the procedures for placing a petition on the ballot. The court reasoned that there is "a gap in statutory law on when and how a municipality should address petitions that appear to its officials as presumptively invalid." *Id.* The court "declined the parties' invitation to craft, via judicial fiat, the rules dictating when and now a challenge to an allegedly illegal referendum should be mounted." *Id.*

Similarly, here no court could determine "via judicial fiat" what role the City Council plays in deciding to put a referendum on the ballot, as nothing in the statute creates any such standard. A court could fashion no remedy without violating separation of powers. Only the Legislature could

[19] *Miami-Dade Cty. Bd. Of County Commissioners, et al. v. An Accountable Miami-Dade,* 208.So.3d 724 (Fla. 3rd DCA 2016).

[20] Reviewing a different provision purporting to require a county commission to place a matter on the ballot, the Third DCA concluded, "[N]o ministerial duty existed for the Board to place the petition on the ballot." *Id.*

[21] *Citizens for Strong Sch., Inc. v. Fla. State Bd. Of Educ.*, 262 So. 3d 127, 141 (Fla. 2019).

fill this gap in statutory law. A declaration without any affirmative relief would accomplish nothing and be nothing more than mere "legal advice" or "an answer to satisfy curiosity." *Bryant v. Gray*, 70 So. 2d 581, 584 (Fla. 1952) (citations omitted).

V. CONCLUSION

In sum, the Council has discretion as to whether to place the sales surtax referendum on the ballot. I trust this memorandum answers the questions you have asked. Please do not hesitate to contact me if you have further questions or would like to discuss further.

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